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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 31-101) is reported at 84 F. Supp. 748.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1949 (R. 102). Petitioner's motion for a new trial, seasonably filed, was denied on October 3, 1949 (R. 102). By order of Chief Justice Vinson, dated November 1, 1949, the time for filing a petition for a writ of certiorari was extended to February 16, 1950 (R. 217). The petition for a writ of certiorari was filed on January 31, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, an award fixed on the basis of petitioner's costs in full, as shown by its books, plus 10% profit, consti-

tutes "fair and just compensation" for necessary war goods furnished under orders issued, in 1944, by the War and Navy Departments pursuant to Section 9 of the Selective Training and Service Act of 1940 (providing for mandatory orders to produce war materials) and to Title VIII of the Revenue Act of 1943 ("Repricing of War Contracts").

STATUTES INVOLVED

The pertinent provisions of Section 9 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885, 892, 50 U. S. C. App. 309) and of Title VIII of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VIII, 58 Stat. 21, 92, 50 U. S. C. App. 1192) are set forth in the Appendix, *infra,* pp. 31-35.

STATEMENT

In 1944, petitioner furnished aircraft mountings to the War and Navy Departments (Services) under (1) two orders, one issued by each of the Services under Section 9 of the Selective Training and Service Act (Appendix, *infra,* pp. 31-33), requiring petitioner to deliver to the Services specific quantities of its mountings, (2) two contracts wherein petitioner agreed to deliver certain of its mountings to the Navy at prices which, if they could not be redetermined by mutual agreement, should be fixed by the Secretary of the Navy under Title VIII of the Revenue Act of 1943 (Appendix, *infra,* pp. 33-35), and (3) a repricing order issued jointly

by the services under Title VIII and applicable to all products thereafter furnished, directly or indirectly, to the Services. Section 9 empowered the Government to place mandatory orders to produce war goods, and provided for the payment to the manufacturer of compensation which "shall be fair and just". Title VIII authorized the unilateral fixing or refixing by the Government of prices of articles required for war contracts and subcontracts, if a "fair and reasonable price" could not be negotiated with the contractor, and established ultimate court determination of "fair and just compensation for the articles and services furnished under the terms of the [price-fixing] order." The Services determined the statutory "fair and just" compensation for the mountings supplied under the above orders and contracts by fixing a price which allowed petitioner's costs in full as shown by its books plus a profit of 10%.

Petitioner, dissatisfied with this award, filed two complaints in the Court of Claims, one on September 28, 1945 (amended on April 8, 1948), under Section 801(c) of Title VIII (R. 1-17), and the other on September 5, 1946, under Section 9 (R. 18-30). In these complaints, petitioner claimed that its established list prices should be accepted as the measure of compensation (R. 11, 20), and sought judgment of $512,534.09, the difference between its list prices and the compensation fixed by the Services (R. 12, 21, 87). The Court of Claims, however, after making extensive and detailed findings of

fact (R. 31-87), approved the Services' determination as fixing the "fair and just" compensation prescribed by these statutes (R. 100). The facts found by the Court of Claims, and on which it based its conclusion, may be summarized as follows:

A. *Background:* Petitioner, a Pennsylvania corporation with its principal place of business in Erie, Pennsylvania,[1] is engaged in the manufacture of devices called "mounts" or "mountings" which are designed to absorb vibration (R. 31-32). H. C. Lord initially manufactured mounts for use in industrial equipment but subsequently made them for use in aircraft where the absorption of vibration is of vital importance, due to the necessity of protecting sensitive flight instruments from the vibration of heavy engines (R. 32).[2] During the course of the years, patents were secured by Lord and his son, Thomas, both on developments of their own and by acquisition (R. 34, 81).[3]

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[1] Petitioner's business was founded as an individual enterprise in 1919 by H. C. Lord, a patent attorney. In 1935, a partnership was formed between H. C. Lord and Blanche M. Hartman (now Mrs. H. C. Lord) with interests of 90% and 10% respectively. The transition to the present corporate form took place in 1940. During the years 1940-1944, H. C. Lord was president of the corporation and owned 50% of the stock; Mrs. H. C. Lord, secretary-treasurer, owned 33% of the stock and Thomas Lord, H. C. Lord's son, was vice-president, with 17% of the stock (R. 31-32).

[2] Up to the early 1930's, all-weather flying was virtually impossible because flight instruments did not give consistently accurate readings on account of destructive vibrations transmitted to the instruments from the aircraft's frame (R. 32).

[3] The Army considered the problem of vibration absorption in aircraft of such importance that in 1934 it established a special laboratory in Wright Field to aid in its solution. Ex-

The court below stated that gradually Lord's aircraft mounts became generally accepted by the industry, almost to the complete exclusion of other products; from 1932 to 1942, petitioner occupied "a dominant place in that field with little or no real competition" (R. 34-35).[4] One or two competitors entered the field in 1941, followed to a larger extent during 1942 and 1943 by others; these competitors, however, manufactured only one or very few types of these products (R. 37, 38). Petitioner remained the only concern producing a full line and for many items was the sole source of supply (R. 37-38).[5] All during the war period petitioner, its subcontractors working under its instructions, and its competitors generally worked

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tensive work was carried on especially by one W. E. Stitz, a War Department aeronautical engineer. In 1939 Stitz obtained a patent on a mounting which he developed and which was an improvement on the Lord mounting. Stitz assigned his patent shortly after its issuance to Lord, "subject to a license retained by the United States Government for governmental purposes" (R. 34).

[4] The so-called Lancaster mounting was used by the Navy until 1938 when it was replaced by the Lord mounting (R. 33).

[5] During the early years of the war, petitioner's products were the only ones approved under Army specifications (R. 35, 40). Moreover, where petitioner's mounts were already in use, competitors' products were not always interchangeable and it was therefore necessary to obtain petitioner's parts for maintenance purposes. None of the competitors had the background of petitioner's engineering experience and research and, as a rule, engineering services comparable to petitioner's were not furnished to the purchasers of their products. In addition, purchasers were often reluctant to take the new firms' products in place of those of petitioner which were of a high character and had proved satisfactory over several years of use and with which they were familiar. (R. 38.)

at full capacity in order to supply the needs of the Services (R. 38).

Petitioner first began to show profits in 1935 and thereafter earned slowly increasing profits until 1940 (see chart *infra;* R. 35). With the commencement of the National Defense program and the placement of large orders for aircraft by the War and Navy Departments, petitioner's profits increased tremendously due to the great demand for the aircraft mountings (R. 35).[6] The following chart sets forth petitioner's total sales and profits (before taxes and renegotiation)[7] from 1936-1943 and for the first ten months of 1944 (R. 35):[8]

Year	Sales	Profits	Percentage of profit on cost
1936	$138,676.95	$36,594.43	43.05
1937	181,860.47	38,285.38	32
1938	217,495.72	49,174.15	35.92
1939	414,493.19	125,183.68	53.83
1940	2,167,621.11	1,225,092.23	172.18
1941	4,952,433.59	2,857,692.80	168.13
1942	13,901,571.19	7,328,588.35	123.10
1943	29,266,080.49	12,077,313.59	74.08
1944 (10 mos.)	28,052,766.02	9,769,274.25	56.28

[6] Until 1940, petitioner was still a relatively small concern. On April 1, 1940, petitioner had only 170 employees but, by the end of 1942, the number of its employees had increased to 1850 (R. 35).

[7] Determinations were made under the Renegotiation Act that petitioner's profits were excessive in the amount of $5,200,000 for 1942, $10,250,000 for 1943, and $7,750,000 for 1944. Petitioner has filed petitions in the Tax Court of the United States contesting these determinations and claiming it realized no excessive profits during the years in question. These suits are now pending. *Lord Mfg. Co.* v. *United States,* T. C. 22-R (1942); *Lord Mfg. Co.* v. *War Contracts Price Adjustment Board,* T. C. 353-R (1943); T. C. 603-R (1944).

[8] During these periods, Lord, his wife and son received the following amounts as salaries, partnership profits, and corporation dividends (R. 36):

Petitioner had developed and put on the market the products here involved before our entry into war (R. 38). With little competition in some instances, and in most instances without any competition, petitioner established prices prior to the war which were continued with little or no changes until October 2, 1944, the effective date of the Title VIII repricing order involved here (*infra*, pp. 14-18; R. 38). These prices were based not upon any fixed formula or percentage of profit, but "what the traffic would bear" (R. 38).[9] The only general price change of consequence during its entire existence was a general 15% increase made in November 1939 (R. 38). Petitioner was generally successful in resisting efforts to secure price reductions and consistently refused to give cost breakdowns to prospective purchasers (R. 38-39). When faced with a competitive situation as to some of its products during the war period, petitioner sought to stifle competition by notifying prospective pur-

Year	H. C. Lord	Thomas Lord	Mrs. H. C. Lord
1936	$40,994.03	$5,050.00	$4,554.89
1937	46,672.24	5,327.27	5,185.80
1938	59,708.65	6,010.20	6,634.29
1939	150,978.63	7,496.59	16,773.40
1940	160,617.09	79,375.00	36,591.03
1941	109,500.00	135,000.00	49,500.00
1942	109,500.00	135,000.00	49,500.00
1943	109,500.00	135,000.00	49,500.00
1944	109,500.00	135,000.00	49,500.00

The net worth of the business increased from about $130,000 in 1936 to about $1,000,000 in 1940, to 4½ million dollars in 1944; this increase was attributable solely to the reinvestment of profits (R. 36-37).

[9] In almost all cases, particularly for its most important product, the expensive so-called dynafocals, no reduction in price was allowed for large orders (R. 38).

chasers of competing products as to its patent holdings and their potential liability for patent infringement, with the result in many instances that the prospective purchaser sought petitioner's product even at a somewhat higher price rather than risk incurring liability for patent infringement (R. 39).[10] Although the competitors' prices became generally lower than petitioner's,[11] for various reasons, including the patent situation and desperate need for mounts (see, fn. 5, *supra*, p. 5), petitioner supplied to the Services about 60% of all aircraft mounts during the war years (R. 39). These mounts were both sold directly to the Services and also supplied to airplane manufacturers who had prime contracts with the Government (R. 39). "Because of the conditions under which these mounts were produced and sold by [petitioner], both prior to and during the war period, the prices charged therefor by [petitioner] were not fixed in a real competitive market" (R. 39).

In August 1942, after a short period of letting contracts without requiring estimates of costs or profits, the Air Force adopted the common business practice of requiring contractors in fixed price

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[10] Petitioner consistently refused, even during the war, to grant any of the many requests for licenses under its patents (R. 82).

[11] Initially, the competitors' prices did not differ greatly from petitioner's. In some instances, they were higher and in others they were lower. But with the acquisition of experience and increase in volume, the competitors' prices were reduced until, by 1944, they were generally lower than petitioner's. (R. 39, 82-85.)

prime contracts over $25,000 to submit cost breakdowns and proposed profits (R. 40).[12] While there was no fixed limitation on allowable profits, the system was designed not only to prevent excessive profits but to allow profits commensurate with the risks assumed and services performed (R. 41). The profits allowed normally ranged from 6% for manufacturers such as petitioner, who were merely continuing to manufacture their normal peacetime products, to 10% for contractors venturing new untried fields or performing extraordinarily difficult operations (R. 41).[13] This system received an almost unanimous acceptance by contractors and under it approximately 77 billion dollars worth of materials and supplies were procured (R. 42). Although most large procurements involved patented items, no claim was made, except by petitioner, that contractors thereby became entitled to larger profits (R. 42).[14]

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[12] An Air Force cost analysis branch was created to analyze cost breakdowns submitted by contractors with the branch's approval administratively required on all contracts for more than $25,000. If the branch questioned the fairness or reasonableness of a price, conferences were normally arranged with the contractor in an attempt to arrive at a mutually agreeable price. (R. 40-41.)

[13] Ten per cent on fixed price procurements was generally accepted and considered as the top allowable limit. In a few exceptional instances, because of very special circumstances, 12% profit was permitted. Since these allowances were generally based on estimated costs, the profits actually realized were subject to renegotiation during most of the war. (R. 41-42.)

[14] Navy Department procurement was similar to the Air Force's with the exception that the Navy generally considered 12% profit on estimated cost as the top limit and the profits

B. *Events leading up to orders here involved:* (1) *Section 9 order of War Department:* In November, 1942, petitioner refused to furnish the cost breakdown requested by the Air Forces in connection with a comparatively small contract, and referred to a general audit previously made of its 1941 Air Force contracts (R. 42-43). Since that audit showed (1) profits on individual items ranging from 42 to 808%, (2) net profit for 1941 of 2.8 million on about 5 million dollars of business done, and (3) an indicated profit on some of the items involved in the proposed procurement ranging from 140 to 275%, petitioner's officials were requested to come to Air Force Procurement Headquarters at Wright Field to discuss prices (R. 43). At the conference, petitioner refused to reduce its prices, claiming, *inter alia,* that since its products were patented, it could charge any price that the market would bear and further that since commercial purchasers had paid these prices over a long period of time, the prices it was charging were only established commercial prices (R. 43).[15] Despite the cost analysis branch's adverse recommendation, the procuring officials reluctantly purchased these items from petitioner at its list prices because it was the sole source of the items which were urgently needed to maintain mounts already

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it allowed ranged from 10 to 12%, likewise without regard to whether the items procured were produced under patents (R. 42).

[15] This position was subsequently elaborated upon in a long memorandum submitted by petitioner's president on December 28, 1942 (R. 43-44).

installed (R. 44). Thereafter, at various times throughout 1943, similar procurements, although likewise disapproved by the cost analysis branch, were necessarily made from petitioner by Air Force procurement officials (R. 44).

In January, 1944, after a conference with the Eastern Procurement District procurement officials,[16] at which it reiterated its consistent position on prices (see *supra,* pp. 7, 10), petitioner finally acceded and submitted a cost breakdown in connection with $650,000 worth of mounts and spare parts which the Air Forces needed (R. 45). Since the breakdown showed that petitioner proposed to make a 64% profit on one group of items and 39.8% on the other, the proposed procurement was disapproved (R. 45). Upon the refusal of petitioner's vice-president to accept a contract based on prices adjusted to reflect 10% profit, the matter was referred to Wright Field (R. 45). At a further conference at Wright Field on March 22, 1944, Air Forces officials, in order to secure urgently needed products available only from petitioner on a voluntary basis, offered, subject to the approval of the Secretary of War,[17] to pur-

[16] In 1943, Air Force procurement activities, relating to products such as petitioner's, were decentralized to the Eastern Procurement District of New York City, which, although it had the same experiences with petitioner, out of necessity continued to purchase petitioner's products at petitioner's prices (R. 45).

[17] The offer was conditioned on the approval of the Secretary of War because the 15% profit proffered exceeded the generally accepted 10% top limit profit which had been approved as fair and reasonable for this type of Air Force fixed price contract (R. 46). See *supra,* p. 9.

chase the products on the basis of petitioner's estimated costs, as disclosed in its cost breakdown, plus a 15% profit (R. 46). Petitioner, however, failed to give any answer within the requested period or even after further exchanges of wires (R. 46-47).

On May 19, 1944, an order dated May 6 (designated as "Compulsory Order No. W 33-038 ac-2753") of the Under Secretary of War, acting under Section 9, was sent to petitioner, requiring it to furnish specified quantities of 61 of its products [18] to the War Department (R. 51-53).[19] Petitioner thereafter submitted a "Price Analysis" of the items covered by the order, which showed, on petitioner's prices, a loss of 11% on one item and of .0036% on another, profits ranging up to 337% on the others, with an over-all profit of 43.84% on all 61 items (R. 56). Subsequently, petitioner, in formally acknowledging the order for the first time, enclosed its price schedule, with the comment that "We know of no other relevant data for the determination of appropriate prices, except these schedules * * *" (R. 57-58). Because

[18] The orders embraced the items as to which the Air Forces had unsuccessfully sought a basis for voluntary agreement since they had been unable to obtain quotations on these items from any other source (R. 52).

[19] The order stated that petitioner would be paid "fair and just compensation" and authorized it to submit "such data as in your opinion may be pertinent to the determination of such reasonable price" (R. 53). The letter of transmittal advised petitioner that if it so desired, negotiation to arrive at satisfactory prices with a view to superseding the order by a voluntary agreement would be permissible (R. 54).

of negotiations looking toward voluntary agreement as to prices, the War Department deferred fixing compensation under this order. These prices were fixed on October 24, 1944, on the same basis as the prices in the Title VIII repricing order (R. 81). See *infra,* pp. 16-17.

(2) *Navy Department Section 9 Order:* At or about the same time, the Navy required four items, on which petitioner among others had submitted bids (R. 47). The Navy preferred petitioner's products but inasmuch as petitioner's prices were substantially higher, the Navy sought through negotiation to have these prices reduced (R. 47). Upon the failure of these negotiations, the Navy, also acting under Section 9, on April 27, 1944, placed an order (designated "Compulsory Order No. 2") with petitioner for specified quantities of the four items in question (R. 47-49).[20] In response to petitioner's protest of May 3, which similarly enclosed its price schedules for the articles, with the comment: "We know of no other relevant data for the determination of appropriate prices" (R. 50) (*supra,* p. 12), the Acting Secretary of the Navy on May 16, stated "that, according to your own figures, your prices exceed your costs by 131%" (R. 51). On May 27, the Secretary of the Navy made his determination of reasonable prices, totalling $85,-

[20] The order was similar in text to that of the War Department. See fn. 19, p. 12, *supra.* Both orders are set out in full in the findings of the Court of Claims at R. 47-49, 51-53.

302.70, on the basis of a report, made by Navy representatives after examining petitioner's books, which showed that by allowing every cost item appearing on the books, including all administrative overhead, selling and patent expenses, petitioner would have made $113,067.10 profit on its originally quoted price of $189,840, a profit of 147% on cost (R. 54). The prices were fixed by the Secretary of the Navy to yield petitioner profits of 10% on the prices so fixed, and 11.1% on cost (R. 55).

(3) *Navy Contracts of June 29 and July 24, 1944:* On June 29, and July 24, 1944, respectively, the Navy entered into two contracts with petitioner for the furnishing of certain products (R. 58). Each contract contained a "Price Redetermination" provision, which, after stating that " 'the prices specified herein * * * are the prices quoted * * * by the Contractor,' " provided that the parties should negotiate for a redetermination of prices by mutual agreement and in the event of failure of these negotiations, the Secretary of the Navy could fix prices under Title VIII of the Revenue Act of 1943, and petitioner should have all remedies available thereunder (R. 58-59).

(4) *Title VIII Joint Repricing Order:* Meanwhile, on June 13, 1944, a meeting was held between representatives of petitioner and the Services to ascertain whether a voluntary agreement could be reached as to the items covered by the two orders under Section 9 and also to reexamine the entire

procurement relationship between petitioner and the Government, including both its prime and its subcontracts (R. 56). Despite renewal of the Army's offer to pay prices based on estimated costs plus 15% profit (see *supra,* pp. 11-12), no agreement was reached (R. 57). Further meetings and negotiations took place on July 13, July 20, and other times, at which the Services proposed an interim 32% discount on petitioner's list prices pending fixing of prices on a realistic cost basis (R. 59-63). Petitioner indicated that it would accept these terms in consideration of the "promise of the Services of their cooperation and assistance in providing a sound financial condition of the company and of the receipt of such relief" (R. 63). Subsequent negotiations revealed that petitioner was conditioning its acceptance not only on approval of outstanding applications for certificates of necessity under Section 124 of the Internal Revenue Code, permitting accelerated amortization for tax purposes, but also on freedom from statutory renegotiation (R. 63-64).[21] See *supra,* p. 6, fn. 13, p. 9; R. 41-42. The whole problem was further discussed at a large conference on August 29 and upon failure to agree, the Services finally concluded that they had no alternative but to commence formal proceedings under Title VIII for

[21] Although it was against petitioner's policy to avail itself of direct government financing, petitioner by May 1944 had applied for and received certificates of necessity under Section 124 of the Internal Revenue Code for its expanded emergency facilities in the amount of approximately $3,700,000 (R. 36).

the entire repricing of petitioner's products which were being supplied, directly and indirectly, to the Services (R. 64-65).

On August 30, 1944, the Services delivered to petitioner identical letters headed "Requirement to Negotiate Fair and Reasonable Prices," setting a time and place for meeting for that purpose (R. 65-66, 67).[22] Preparatory to the meeting, the Services conducted a joint examination of petitioner's books which disclosed that on the basis of its current costs, petitioner would make 73.36% profit on its unfilled military orders, as of June 30, 1944, of approximately $16,000,000, and that petitioner had made 73% profit on its 1943 business and 86.65% profit on its January and February, 1944 business (R. 67).[23] Since petitioner took basically the same position at this conference as it had taken at previous conferences,[24] the Services' representatives

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[22] The letters stated, *inter alia:*

> Negotiations with you with reference to the prices of the above-mentioned products have extended over a long period of time and you have refused voluntarily to agree to fair and reasonable prices therefor. The prices charged by you * * * have resulted and are continuing to result in your earning excessive profits from war contracts. [R. 66.]

[23] All of petitioner's costs, as shown by its books, directly or indirectly attributable to manufacturing items, were included in the computation, including all general overhead, administrative, and selling expenses as well as patent expenses. Questionable items were decided on bases most favorable to petitioner. (R. 67.)

[24] The only additional offer advanced by petitioner was the unworkable suggestion that petitioner would meet any of its competitors' prices provided certain factors were taken into consideration in comparing the competitors' prices with petitioner's prices, that is, petitioner would meet a competi-

concluded that petitioner was not negotiating in good faith and adjourned the meeting (R. 68-69). On September 23, the Secretaries of War and Navy, acting pursuant to Title VIII, jointly issued to petitioner "Army-Navy Joint Repricing Order No. 1."[25] This order which embraced 655 items—consisting of practically all of petitioner's principal products then being furnished to the War and Navy Departments "either directly under prime contracts with [the] Departments or indirectly under subcontracts" (R. 69-72)[26]—was to be effective from October 2, 1944, to March 31, 1945 (R. 71), and fixed prices for these items on the basis of the Army-Navy audit of petitioner's costs,[27] to which was added a profit of 10% on costs (R. 72).[28]

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tor's prices provided quantities of orders were the same, the quality was the same, the delivery dates were identical, and the relative amounts of governmental financial assistance were comparable (R. 68-69).

[25] Copies of the order were sent petitioner's customers advising them of the new prices applicable to petitioner's products covered by the Order (R. 72).

[26] The order specifically provided that it did not apply to the Section 9 orders previously issued (R. 72). See *supra*, pp. 10-14.

[27] After the Order became effective, the Services established at petitioner's plant a "cost inspection office" to discover such cost changes as might occur from time to time as would warrant amending the Order, as well as to receive such suggestions as petitioner might have to offer for amendments, based either upon alleged mistakes in the Order or upon changed cost conditions. However, no such suggestions were ever received by the "cost inspection office". (R. 72.)

[28] The amount of profit allowed was more than would ordinarily have been allowed under the Services' pricing practice (*supra*, p. 9), especially since a substantial portion of petitioner's work was being performed by sub-contractors,

In addition to protesting the Order in identical letters dated September 30, 1944, to the Secretaries of War and Navy (R. 72-73),[29] petitioner, in an attempt to force the Services "to rescind the repricing order, or at least to have it modified" (R. 74), notified its customers that effective with the Repricing Order, they would have to pay cash in advance for the entire amount of any orders for items covered by the Repricing Order, that shipments on pending orders would have to be paid for on a C. O. D. basis, and that its customary terms of allowing discounts for payments within specified times was abandoned, with the new terms "net cash (no cash discount)" (R. 75-76).[30] The adoption of this policy brought a large number of complaints and protests; some customers, because of need for petitioner's products, complied, but others refused to deal with petitioner with the result that deliveries fell sharply during October (R. 77). The Services wired petitioner several times informing it that this new pol-

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but in the circumstances and in the interest of fairness, the Services decided to allow the highest profit margin which the War Department was allowing to contractors on such fixed-price production contracts (R. 69).

[29] Petitioner protested on the grounds, *inter alia*, that "no effort has as yet been made by the Services to negotiate with the Lord Company" as required by statute and that the order "gives no consideration to * * * the fact that the Lord products are covered and protected by patents and the fact that the user of Lord products incurs no liability for the infringement or use of patents" (R. 73).

[30] This new policy was not to apply to orders or items not covered by the Repricing Order or to civilian business, as to which the former practices were continued (R. 76).

icy violated the Repricing Order[31] and was interfering with vitally needed war production (R. 77-81). Upon petitioner's failure to revert to its former terms of sales, the Secretary of the Navy, on October 25, 1944, acting pursuant to Executive Order No. 9493 (9 F.R. 12860) specifically authorizing and directing such action, seized and thereafter operated petitioner's plant (R. 81).[32]

For all the items supplied by petitioner under the orders and contracts here involved, petitioner was paid, at the prices fixed by the Services, the sum of $979,050.10 (R. 87). Since it cost petitioner $885,954.89 to produce these items, petitioner actually realized a profit thereon of $93,905.21, a profit of 10.5% on cost (R. 87).[33] At petitioner's list prices, which it seeks to establish here as the measure of compensation, petitioner would have received $1,491,584.19, and since $605,629.30 of that would have been profit, it would have realized 68.3% profit on cost (R. 87). The difference between the $605,629.30 profit it would have

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[31] The Repricing Order provided:

> * * * No change shall be made in Lord Manufacturing Company's existing usual terms and conditions of sale with respect to deliveries subject to this order that shall have the effect of increasing the return to Lord Manufacturing Company provided by such prices under such terms and conditions [R. 70-71].

[32] Petitioner's separate suit to recover compensation for the Government seizure and operation of its plant is pending in the Court of Claims. *Lord Mfg. Co.* v. *United States*, C. Cls. No. 47000.

[33] The profit actually received was slightly higher than that estimated since petitioner's actual costs were somewhat below those estimated.

received under its list prices and the $93,095.21 profit received under the Services' determination is $512,534.09, the amount which petitioner seeks to recover in these proceedings. See *supra*, p. 3.

ARGUMENT

This proceeding is one of several brought against the Government by petitioner, the dominant producer of desperately needed aircraft mountings, as a result of petitioner's persistent refusals, at the height of the war, to accept for its mountings anything less than its commercial list prices, which were set at "what the traffic will bear" and which netted petitioner fantastic profits, in some instances in excess of 300% on costs.[34] This case marks one of the very few instances where the Services invoked their authority under Section 9 of the Selective Training and Service Act of 1940, and Title VIII of the Revenue Act of 1943. The Services exercised that authority here very reluctantly, and only after long-drawn out efforts to obtain voluntary price reductions from petitioner convinced them that petitioner was intent on full exploitation of its patents and near-monopoly position.

In this case, petitioner is seeking to obtain judicial approval of its list prices as the measure of

[34] In addition to the instant case, the three renegotiation proceedings pending in the Tax Court (*supra*, fn. 7, p. 6), the suit for the seizure of its plant (*supra*, fn. 32, p. 19), there are two suits for infringement of petitioner's patents brought under the Act of June 25, 1910, as amended (35 U. S. C. 68). *Lord Mfg. Co.* v. *United States*, C. Cls. Nos. 47714, 47715.

compensation for the mountings furnished under the Section 9 and Title VIII orders. Petitioner assumes that these orders involved a Fifth Amendment taking of its property and accordingly urges that it is entitled to the just compensation prescribed by that Amendment. Arguing from this premise, petitioner contends that its established list prices constituted the market value of its products, and hence should have been accepted by the Court of Claims as the measure of its compensation, apparently without reference to the tremendous profits it would obtain thereunder. This position, we submit, is patently unsound and raises no questions warranting review by this Court.

1. Contrary to petitioner's flat statement (Pet. 3), the Court of Claims did not hold that the Services' actions resulted in a Fifth Amendment taking. On the contrary, the court below merely stated that "we are inclined to the opinion that there was a taking of [petitioner's] property" (R. 98) and went on to comment, "However, in the circumstances of this case, we do not think it particularly important whether it be construed as a strongly worded order with which [petitioner] reluctantly complied, or whether it be construed as a taking of private property. The net results as we see them are practically the same." (R. 98.) It was the court's position that—regardless of whether or not there was a taking here, and whether or not the "just and fair" compensation

prescribed by Section 9 and Title VIII may, in non-taking cases, be less than the Fifth Amendment's standard—the full measure of the constitutional requirement was satisfied by the administrative awards in this case. This holding we believe to be unassailable.[35]

The decisive test in "just compensation" cases was recently stated by the Court:—"Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill? The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . ." *United States* v. *Commodities Trading Corp.*, Nos. 156, 163, this Term (decided March 27, 1950), slip opinion, p. 2. As summarized last Term in *United States* v. *Cors*, 337 U. S. 325, 332:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does

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[35] If there was no taking, the just compensation clause of the Fifth Amendment is, of course, irrelevant, except insofar as its standard may be incorporated in Section 9 and Title VIII.

We think it easily demonstrable, if the issue becomes pertinent, that at least the Navy contracts of June 29 and July 24, 1944 (*supra*, p. 14) and the joint repricing order (*supra*, pp. 14-18) issued under Title VIII (*infra*, pp. 33-35) did not involve a taking. Cf. *Lichter* v. *United States*, 334 U. S. 742, 745, fn. 1, 787, 788.

> not contain any definite standards of fairness by which the measure of "just compensation" is to be determined * * *. The Court in an endeavor to find working rules that will do substantial justice had adopted practical standards, including that of market value.

See, also, *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, 402; *United States* v. *Felin & Co.,* 334 U. S. 624, 641; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279-280; *United States* v. *Miller,* 317 U. S. 369, 373, 374-375.

It follows from these principles that even if petitioner's commercial list prices could properly be characterized as evidencing a "market value" of a sort,[36] they should not be used as the measure of its just compensation. When the application of market value "would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *United States* v. *Commodities Trading Corp.,* Nos. 156, 163, this Term, decided March 27, 1950, slip op., p. 2. Cf. *United States* v. *Miller,* 317 U. S. 369; *Olson* v. *United States,* 292 U. S. 246; *United States* v. *Cors,* 337 U. S. 325. Petitioner's list prices did not reflect the type of market value which sometimes is used as the meas-

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[36] It is difficult to see how the list prices can be equated with market value just because petitioner insisted on selling at those prices and its customers purchased at those prices because they could not help themselves. Market value connotes a number of sellers and buyers, and other manufacturers of these products, who were relatively new in the field, were selling at prices below those set by petitioner. *Supra,* p. 8; fn. 37, *infra,* p. 24; R. 82-5.

ure of just compensation, *i.e.*, the price which "a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, 317 U. S. 369, 374. On the contrary, petitioner's prices were those of a near-monopolist and were set not on the basis of any fixed formula or percentage of profit but as the Court of Claims found (R. 38), at "what the traffic would bear." Before the war, petitioner had a virtual monopoly of the aircraft mounting field; it occupied "a dominant place in that field with little or no real competition" (R. 34-35). Although some competition did appear during the war, petitioner resisted it strenuously by threatening suits for patent infringement (R. 39). Despite the competition, which nevertheless did secure a foothold,[37] petitioner, who remained the sole concern producing a full line and the only source of supply of many items, continued to supply about 60% of all aircraft mounts (R. 37-38, 39).

The aircraft industry and the Government did not pay petitioner's prices willingly; they paid these prices because they desperately needed products such as petitioner's which, in many instances, were produced only by petitioner. The findings of the court below detail the numerous efforts made to obtain voluntary price reductions from petitioner and the reluctance of the Government and

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[37] Although the competitive prices were higher initially than petitioner's, they were generally lower in 1944 as the competitors acquired experience and their volume increased (R. 39).

the industry to purchase from petitioner, but the needs of the situation were so imperative that there frequently was no alternative but to buy petitioner's mountings at petitioner's prices. Coupled with this great need was petitioner's strategic patent position, to which the Court of Claims rightly referred in its discussion of the character of the "market" and the "market value" claimed to be present in this case (R. 100). As summarized by the court below, "because of the conditions under which these mounts were produced and sold by [petitioner], both prior to and during the war period, the prices charged therefor by [petitioner] were not fixed in a real competitive market" (R. 39).[38]

Moreover, it would have been unfair to virtually all other manufacturers as well as the public to accept list prices returning such fantastic profits to petitioner as the measure of just compensation. As pointed out by the court below (R. 101):

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[38] There is no substance to petitioner's contention advanced both in the negotiations with the Services (R. 43, 44, 73) and in the court below, as well as inferentially suggested here (Pet. 20, 21), to the effect that the patents embodied in its products entitled it to its full list prices. Apart from the fact that practically no other contractor claimed entitlement to higher profits by reason thereof (R. 42), it is clear that the Act of June 25, 1910, as amended (35 U. S. C. 68), and the Royalty Adjustment Act (Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. 89-96), were enacted for the express purpose of making such patented products available directly or indirectly to the Government at fair and just costs. Cf. *Crozier* v. *Krupp*, 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331; *Coffman* v. *Federal Laboratories, Inc.*, 171 F. 2d 94 (C. A. 3), certiorari denied, 336 U. S. 913.

> The nation was in great peril—our national life being at stake. People were necessarily attuned to the war effort. Men and women were uncomplainingly permitting themselves to be drafted for all kinds of difficult war jobs. Women and even children were driving tractors in the hot sun to produce and supply the food essential to the world-wide operations of our army and navy and those of our allies. Young men, who had never had a fling at life, were taken from their homes to face hardship and even death on distant fields. Businessmen generally and even plaintiff's competitors were willingly accepting the 10 percent above cost for supplies and equipment needed in the war effort. Every effort was made to mobilize manpower and materials. At such time it is unthinkable that a man would insist on profits of 50 to 100 percent; and it is inconceivable that any court would allow any such profits as just compensation. It is true that plaintiff produced an article of quality. That is to its credit. It is also natural that those who had the responsibility of procuring the equipment for those who were to fight in the air should want the best. But the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time.

In these circumstances, the court below was plainly justified in rejecting petitioner's list prices —whether they evidenced the then market value, or not—in favor of cost plus a reasonable profit as the measure of compensation to which petitioner

was entitled. See, *e.g., United States* v. *Commodities Trading Corp.*, Nos. 156, 163, this Term (decided March 27, 1950), slip op., 2 [39]; *United States* v. *Cors*, 337 U. S. 325, 333-334; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396; *Highland* v. *Russell Car Co.*, 279 U. S. 253; see also the discussion before the Advisory Board on Just Compensation on "calamity" and "hold-up" values set out in the dissenting opinion in *United States* v. *Cors*, 337 U. S. 325, 341, fn. 3, and in the Brief for the United States in the *Commodities Trading Co.* case, *supra*, at pp. 64-66.[40]

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[39] In *Eastern Machinery Company* v. *Under Secretary of War*, C. A. D. C. No. 10309 (decided April 10, 1950), the Court of Appeals for the District of Columbia Circuit, in an opinion written by Judge Fahy, rejected a contractor's claim that the profits left him as the result of statutory renegotiation were too small, with the comment (slip op., p. 3):

> "There is no constitutional guarantee of more than a small profit in war work. See *Yakus* v. *United States*, 321 U. S. 414, 431 (1943); *Bowles* v. *Willingham*, 321 U. S. 503, 519 (1943). We believe that this view is also supported by the recent decision in *United States* v. *Commodities Trading Corp., supra.*"

[40] As for petitioner's contention that it should have received its list prices because they allegedly constituted the O.P.A. ceiling prices (Pet. 13-14), it should be noted, *first*, that neither the record before the court below nor the record in this Court contains sufficient evidence indicating what were the ceiling prices, if any, applicable to petitioner's products sold for military use, and that the Court of Claims made no finding on the point; *secondly*, that the claimed ceiling resulted from a price regulation which merely fixed the maximum at whatever price happened to be charged by the particular vendor in January 1942 (Pet. 8, fn. 6) and did not establish a single ceiling applicable to all vendors in like circumstances; and, *thirdly*, that in the *Commodities Trading Co.* decision, *supra*, the Court held only that the O.P.A. ceiling should normally be accepted as the "*maximum* measure of compensation" (slip op., p. 7; italics supplied), and not that

2. The Services' determination as to compensation, which the Court of Claims approved and which was fixed so as to return to petitioner all of its costs plus abundant profits considering the tremendous volume of business involved, plainly met the fair and reasonable compensation requirements of Section 9 and Title VIII as well as of the Fifth Amendment. As to costs, all costs shown by petitioner's books, directly or indirectly attributable to manufacturing items, were allowed, including all general overhead, administrative and selling expenses, with all questionable items decided on bases most favorable to petitioner (R. 54, 67, 72). This allowance of costs was generous, since the determination of *reasonable* costs would here be a prerequisite to the fixing of fair compensation. It is clear that in so determining costs at least the salaries paid by petitioner's officers to themselves (see chart, *supra,* fn. 8, pp. 6-7) could properly have been reduced.

The 10% profit allowed was likewise more than generous. "In the interest of fairness," petitioner's profits were fixed so as to yield "the highest profit margin which the War Department was allowing to contractors" on the type of production here involved (R. 69). This profit figure "was more than would ordinarily have been allowed" (R. 69) under the Services' pricing systems which

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it established the minimum or usual award. In that case, the Government did not contend for any figure less than the ceiling price.

were almost unanimously endorsed by the country's manufacturers who dealt with the Services (R. 41-42). Indeed, during World War II, Congress frequently limited the fees on cost-plus-fixed-fee contracts to 6 or 7% of the estimated cost. See, *e.g.*, 54 Stat. 872, 873 (Army contracts for military posts, fee not to exceed 6% of the "estimated cost" of the contract); 56 Stat. 176, 178 (Army and Navy vessel, aircraft and other contracts, 7%)); and Executive Order 9001, dated December 27, 1941 (6 F. R. 6787), promulgated under the First War Powers Act (50 U. S. C. App. 601), providing that in the absence of other profit limitations by applicable statutes, the fixed fee under any cost-plus-fixed-fee contract executed under the Act should be limited to 7 per cent of the estimated cost.

The liberality of this determination is further manifest when projected for petitioner's production of the entire year, translated into terms of dollars as applied to its total volume, and compared with its comparatively small profits during the typical pre-war years. It cost petitioner over $20,000,000 to turn out its 1944 volume.[41] Prices yielding 10% profit on such costs, if they had been in effect for the entire year, would thus have returned profits of approximately $2,000,000 a year.

[41] For the first ten months of 1944—a period largely unaffected by the orders involved here—petitioner's sales were approximately $28,000,000, and its profits were approximately $10,000,000 (see R. 35), leaving costs of approximately $18,000,000, or approximately $1,800,000 per month. Over a 12-month period, its costs would therefore have totaled approximately $21,000,000.

This would certainly be a handsome return for a company such as petitioner which, in the pre-war years 1936-1939, realized profits averaging only $62,000 a year.

CONCLUSION

The holding of the court below is clearly correct. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950

APPENDIX

1. Section 9 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885, 892, 50 U. S. C. App. 309) provides in pertinent part:

> The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.
>
> Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or

the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for

not more than three years and a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

2. Title VIII of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VIII, 58 Stat. 21, 92, 50 U. S. C. App. 1192) provides in pertinent part:

TITLE VIII—REPRICING OF WAR CONTRACTS

SEC. 801. REPRICING OF WAR CONTRACTS.

(a) As used in this section the terms "Department", "Secretary" and "article" shall have the same meanings as in subsection (a) of the Renegotiation Act.

(b) When the Secretary of a Department deems that the price of any article or service of any kind, which is required by his Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with his Department or of any subcontract thereunder, is unreasonable or unfair, the Secretary may require the person furnishing or offering to furnish such article

or service to negotiate to fix a fair and reasonable price therefor. If such person refuses to agree to a price for such article or service which the Secretary considers fair and reasonable, the Secretary by order may fix the price payable to such person for furnishing such article or service after the effective date of the order, whether under existing agreements or otherwise. The order may prescribe the period during which the price so fixed shall be effective and such other terms and conditions as the Secretary deems appropriate.

(c) Any person aggrieved by an order fixing a price under this section may sue the United States in any appropriate court. In such suit, such person shall be entitled to recover from the United States the amount of any difference between (1) fair and just compensation for the articles and services furnished under the terms of the order and (2) the price fixed for such articles and services by the order; but if the prices so fixed by the order are found to exceed fair and just compensation for such articles and services, such person shall be liable to the United States in such suit for the amount of this excess. Any such suit shall be brought within six months after the order by the Secretary on which it is based, or after the expiration of the period or periods specified in such order, whichever last occurs. Such a suit shall not stay the order involved.

(d) Whenever any person wilfully refuses, or wilfully fails to furnish any such articles or services at the price fixed by an order of the

Secretary in accordance with this section, the President shall have power to take immediate possession of the plant or plants of such person and to operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended.

(e) The authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(f) Every purchase order or agreement, or contract to make or furnish any article or service of any kind, which is required by a Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with such Department or of any subcontract thereunder, shall, if made thirty days or more after the date of the enactment of this Act, be deemed to contain a provision under which the person making or furnishing such article or service agrees that notwithstanding other provisions of the purchase order, agreement, or contract, he shall be entitled to receive for such article or service only the fair and just compensation provided for in subsection (c).

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